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February 15, 2012

VIA ELECTRONIC FILING
Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: *Eastern Alabama Railway LLC – Petition for Declaratory Order*,
STB Docket No. FD 35583

Dear Ms. Brown:

Paducah & Louisville Railway, Inc. hereby offers these comments in the above-captioned proceeding.

If there are any questions concerning this filing, please contact me at the address and phone listed above or at wmullins@bakerandmiller.com.

Respectfully submitted,

William A. Mullins

cc: J. Thomas Garrett

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. FD 35583

EASTERN ALABAMA RAILWAY – PETITION FOR DECLARATORY ORDER

COMMENTS OF PADUCAH & LOUISVILLE RAILWAY, INC.

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Attorneys for Paducah & Louisville Railway, Inc.

Dated: February 15, 2012

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. FD 35583

EASTERN ALABAMA RAILWAY – PETITION FOR DECLARATORY ORDER

COMMENTS OF
PADUCAH & LOUISVILLE RAILWAY, INC.

INTRODUCTION

Paducah & Louisville Railway, Inc. ("P&L"), a Class II rail carrier, hereby tenders comments in the above-referenced proceeding.[1] P&L is pleased that the Board has elected to institute a proceeding here because this case raises important, industry-wide questions concerning the appropriate scope of "as applied" federal preemption[2] in instances where a public

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[1] P&L only recently became aware of the subject declaratory order proceeding, which is unfolding very quickly at the behest of one of the parties. P&L is faced with a very similar issue regarding the efforts by the Louisville Water Company to put a pipeline under and along the P&L tracks without the consent or approval of P&L. The Director's January 27, 2012 Order instituting this proceeding did not specifically call for, nor did it prohibit, comments by interested third parties. As a general declaratory order proceeding instituted pursuant to 5 U.S.C. § 554(e), any interested person is entitled to comment without the need to obtain leave to intervene. Nonetheless, if permission to intervene here for the purposes of submitting comments is required, 49 C.F.R. § 1112.4 provides that an interested party may intervene where such participation "would not unduly disrupt the procedural schedule, and would not unduly broaden the issues raised." V&S Railway LLC – Petition for Declaratory Order—Railroad Operations in Hutchison, Kan., STB Docket No. FD 35459, slip op. at 2 (STB served Feb. 17, 2011). P&L's intervention here would neither disrupt the procedural schedule, nor would it unduly broaden the issues before the Board. As such, if required, P&L specifically requests authority to intervene and file these comments.

[2] See, e.g., Union Pac. R.R. v. Chi. Transit Auth., 647 F.3d 675, 679 (7th Cir. 2011) (in which the court, in addressing a public entity's effort to acquire railroad property via eminent domain, elected to employ an "as applied" standard of federal preemption that was adopted from Board precedent. The court stated that, "the Board surveyed the different approaches in case law [to preemption] and suggested that there were two manners in which state or local actions or regulations could be preempted: (1) categorical, or per se, preemption, and (2) 'as applied'

entity seeks to cross railroad property for purposes of installing utility infrastructure. P&L is keenly interested in the Board's assessment of the facts and the guidance that it offers to the federal court that referred this matter here. P&L urges the Board to consider that the underlying dispute is not an isolated incident. P&L and others have experienced problems with uncooperative public entities that have rejected legitimate railroad property interests and safety and operational concerns. The Board decision here will shape the circumstances under which public entities and railroads negotiate, and how courts or other regulatory bodies may condition crossings of railroad rights-of-way in the future.

ARGUMENT

Eastern Alabama Railway LLC's ("EARY") February 8 Opening Statement suggests that this proceeding is the by-product of a simmering dispute between the railroad and the Utilities Board of the City of Sylacauga, Alabama ("UBCS") concerning UBCS's desire to install a new sewer line across EARY's right-of-way. EARY represents that UBCS is unwilling to – (1) cooperate with EARY's standard crossing permit process; (2) compensate EARY for the crossing; and (3) agree to coordinate with EARY to ensure that the installation of the sewer line is accomplished safely, in accordance with appropriate engineering standards, and without undue disruption of EARY common carrier operations. EARY submits that, had UBCS taken a more conciliatory and cooperative approach to the proposed crossing, UBCS probably would not have had to invoke its state law eminent domain rights to condemn a crossing. UCBS rejects these

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preemption. CSX Transp., Inc.—Petition for Declaratory Order, STB Finance Docket No. 34662 . . . (S.T.B. May 3, 2005); see also New Orleans & Gulf Coast Ry. Co. v. Barrois, 533 F.3d 321, 332 (5th Cir. 2008) (describing the Board's framework). Categorical preemption occurs when a state or local action is preempted on its face despite its context or rationale. If an action is not categorically preempted, it may be preempted 'as applied' based on the degree of interference that the particular action has on railroad transportation – this occurs when the facts show that the action 'would have the effect of preventing or unreasonably interfering with railroad transportation'" (citations and footnote omitted).

arguments, professing willingness to comply with EARY's requirements as long as those requirements were reasonable and consistent with past practice.

EARY does not argue that the invocation of state eminent domain law is categorically preempted under the ICC Termination Act of 1995 ("ICCTA"). Rather, EARY questions whether, under the particular circumstances here, the installation of the proposed sewer line would be undertaken safely, whether UBCS must coordinate with EARY concerning the timing of installation and the means of installation, whether at their sole discretion UBCS and/or its contractors may enter upon EARY's right-of-way for purposes of implementing a crossing, and whether UBCS and/or its contractors have demonstrated that they can and are willing to take appropriate steps to ensure that sewer line installation activity does not unduly interfere with the safe conduct of EARY common carrier service. In short, EARY contends that, under the Board's "as applied" standard, UBCS's efforts to force a crossing over railroad property in a way that could interfere with railroad operations and would compromise railroad safety and are thus federally preempted under 49 U.S.C. § 10501(b).

P&L takes no position on the merits of this individual proceeding; however, the Board should be aware that P&L is having a similar experience with the Louisville Water Company ("LWC"). Like UCBS, LWC is a public utility who is seeking to install a water line under P&L's rail line at a location where P&L holds the underlying land in fee but over which there is a road crossing. But unlike UCBS, LWC has indicated that it is not required to obtain P&L's consent, and in fact does not need any form of permission to install its line, and that it is not obligated to enter into any form of license or other agreement with P&L. LWC goes as far as to claim that it needs no eminent domain authority or any other authority to undertake the proposed project. In short, LWC intends to install the water line with or without P&L's permission or any

form of state, local, or regulatory authority. This raises serious questions over whether LWC – like EARY has accused UBCS of doing – has shown disregard for railroad property interests, rail safety, and concerns that the water line installation not unreasonably interfere with rail operations.[3] P&L does not at this time oppose LWC's proposed crossing. It does, however, ask that LWC obtain P&L's consent and approval (at an appropriate compensation level) prior to undertaking construction activities. Such preconditions ensure railroad and public safety and minimize or avoid altogether rail service disruptions.

Up until a few years ago, such prior consents and approvals (plus a small license fee) were almost universally obtained when public entities sought to cross over or under railroad tracks. More recently, however, local public utility companies, such as water and sewer districts, and even larger corporations, such as telecommunications companies like AT&T, have taken the position that no consents and approvals are required – regardless of whether the railroad owns fee or possesses an easement and regardless of whether the proposed activity may result in disruptions in rail service. From P&L's experience, the present EARY/UCBS case and the disputes with LWC are just recent examples of what seems to be a more frequently occurring industry problem.

In this light, P&L requests that the Board, in making its decision in this case, be mindful that its decision could have ramifications beyond the particular facts of this proceeding. Regardless of how the Board decides the particular facts of this case, the Board should recognize

[3] P&L understands that LWC has taken a similar, aggressive posture in a crossing case involving a rail line owned and operated by CSX Transportation, Inc. ("CSXT"). In that matter, CSX Transportation has requested that Louisville Water Company v. CSX Transportation Inc., Civil Action No. 09-CI-11907, now pending in Jefferson Circuit Court, Commonwealth of Kentucky, be removed to the United States District Court for the Western District of Kentucky, Louisville Division, on the grounds that federal question subject matter jurisdiction exists under ICCTA.

that the careless installation of a pipeline (or other infrastructure) beneath a railroad's tracks without proper consultation and consent of the railroad could threaten the public health and safety and could disrupt rail common carrier operations. As such, each railroad should be entitled to evaluate and approve (or disapprove) crossings on a case-by-case basis, as is commonly done today. No utility or other infrastructure company should have the unilateral right to simply construct along, beneath, or above railroad tracks and facilities without regard to whether such an activity would endanger the public safety or unreasonable interfere with railroad operations.

In the highly unlikely event a railroad would refuse to consent to a crossing notwithstanding the crossing entity's willingness to comply with the railroad's license requirements, such an entity can exercise whatever eminent domain or other rights it may have under state or federal law, and likewise, the railroad can participate in those proceedings, and if necessary, assert preemption – as EARY has done here. But in no event should a company seeking to cross railroad tracks have the unilateral right to undertake construction activities without any form of railroad consent or approval or any other form of government approval and oversight (as LWC is attempting to do).

The Board should also bear in mind, however, that even if an eminent domain proceeding is instituted, state courts oftentimes do not have the statutory authority to impose reasonable conditions on the manner by which the condemnation is undertaken, such as to require the condemning entity to comply with certain preconditions sought by the railroad and agreeable to the court that would ensure railroad safety and protect railroad operations. Instead, such proceedings usually focus on whether the entity has a legal right to condemn, and, if so, the appropriate level of compensation. This leaves the manner by which such condemnations are

undertaken unaddressed. This, of course, then necessitates the need for the railroad to argue preemption (and/or seek redress in the courts or at the STB) simply to have some forum by which appropriate conditions can be placed – which is exactly what has occurred in this proceeding and will continue to occur unless the Board issues appropriate clarifying language.

It is for these reasons that P&L is very interested in the outcome of this proceeding. P&L remains hopeful that LWC will modify its approach to the matter so that a mutually acceptable arrangement can be reached without the need to resort to the courts or this agency. But absent appropriate clarification from the Board, the P&L/LWC dispute, plus many others, will appear before the Board and/or the courts, because although there must be some reasonable standards by which these crossings occur, there seems to be no forum by which these standards are set except through continued assertions of preemption or through condemnation proceedings where the conditions for undertaking the activity remain unaddressed. A middle ground between complete categorical preemption and a utility company's insistence that it can undertake the crossing without regard to the railroad's property rights, safety standards, and operations, must be found.

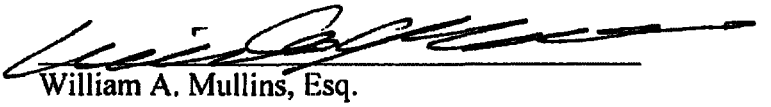
A Board decision recognizing that public companies must comply with reasonable railroad demands in exchange for their consent to the crossing would ensure that public entities do not act with disregard to legitimate railroad interests. The subject declaratory order proceeding enables the Board to provide very useful – and P&L would submit, much needed – guidance for all concerned in instances where a public entity may decide to "go it alone" in undertaking construction activities under, across, or over railroad property, particularly where the public entity has manifested through its past and/or present conduct inadequate regard for railroad operations and railroad safety.

CONCLUSION

For the reasons set forth above, P&L respectfully requests the Board consider these comments in the context of this proceeding, and if necessary, specifically grant permission to intervene in this proceeding to offer the foregoing comments. Because of the agency's expertise as a regulator of railroads, the Board is uniquely positioned to offer guidance of value both to the parties to the present dispute and to others who have encountered, or may encounter, similar situations. The Board's decision here can ensure greater uniformity in railroad crossing cases, will inform the appropriate scope of railroad's prerequisites for granting a crossing, and will help establish reasonable boundaries for public entities to keep in mind in the event that they elect to force crossings of railroad property without railroad consent.

Although not taking a position on the merits of the case now before the Board, P&L requests that the Board take this opportunity to make clear that public utility companies cannot simply undertake construction activities on railroad property without regard to railroad safety and operations and without appropriate liability and compensation standards. In so doing, the Board should clarify that this can be so even where the proposed crossing may be regarded by one or more parties as "routine."

Respectfully submitted,



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Dated: February 15, 2012

Attorneys for Paducah & Louisville Railway, Inc.

CERTIFICATE OF SERVICE

I hereby certify that this 15th day of February, 2012, I served a copy of the foregoing Reply Comments of Paducah & Louisville Railway, Inc., upon all parties of record in this proceeding via U.S. mail, postage prepaid, or by more expeditious means of delivery.

R. G. Wimbish

Robert A. Wimbish
Counsel for Paducah & Louisville Railway, Inc.